

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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MARIA ENRICHETTA MELZI
CARGNANI,

Petitioner,

v.

NO. CIV. S-05-0133 WBS JFM

MEMORANDUM AND ORDER RE:
MOTION TO STRIKE AND MOTION TO
DISMISS

PEWAG AUSTRIA G.m.b.H., PEWAG
WEISSENFELS HOLDING A.G.,
PEWAG WEISSENFELS
INTERNATIONAL G.m.b.H., and
AGYD PENGGE, an individual,

Respondents.

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Petitioner Maria Enrichetta Melzi Cargnani
("Petitioner") brought this action to enforce a foreign arbitral
award against respondents pursuant to 9 U.S.C. § 201 et seq.
Respondents now move to dismiss the action based on lack of
personal jurisdiction and forum non conveniens, or in the
alternative to stay the action pending the resolution of a matter
before the Trieste Court of Appeal in Italy. Petitioner moves to
strike portions of respondents' motion to dismiss and of

1 declarations filed therewith.

2 I. Factual and Procedural Background

3 Respondents Pewag Austria G.m.b.H. ("Pewag Austria"),
4 Pewag Weissenfels Holding A.G. ("Pewag Holding"), and Pewag
5 Weissenfels International G.m.b.H. ("Pewag International"), are
6 corporations organized under the laws of Austria, specializing in
7 the manufacture and sale of high quality chains. (Petition ¶ 3.)
8 Respondent Agyd Pengg is a citizen of Austria and CEO of Pewag
9 Holding, Pewag International, and Metallwaren Beteiligungs
10 G.m.b.H. (the parent company and majority owner of Pewag
11 Austria). (Pengg Decl. ¶ 1.) Petitioner is a resident of Italy.
12 (Petition ¶ 2.)

13 The dispute originates from a contract entered into by
14 the parties on July 13, 1999 ("Agreement"), in which respondents
15 agreed to purchase from petitioner the controlling interest in
16 the three companies (in which petitioner and her brother, Carlo
17 Enrichetta Melzi, were the sole or joint shareholders) in
18 exchange for cash as well as stock ownership in a newly created
19 company. (Petition ¶ 5; Bartlma Decl. Ex. B at 1-3.)

20 On December 12, 2001, the parties entered into a
21 settlement which clarified their obligations going forward and
22 provided for arbitration in the event of further disputes. (Id.)
23 ("Settlement"). (Petition ¶ 5.) Nonetheless, problems continued
24 to arise, and eventually respondents abandoned the transactions
25 provided for in the Agreement.¹ (Mot. to Dismiss 3.)

26
27 ¹ Respondents asserted that throughout 2002 and 2003,
28 they discovered numerous illegal and fraudulent actions taken by
petitioner in relation to properties and companies that were part

1 Based on this failure of performance, an arbitration
2 was held in Trieste, Italy, pursuant to the provisions of the
3 agreement. (Petition ¶ 6.) On September 17, 2003, the
4 arbitrators issued an award in favor of petitioner, in the amount
5 of €9,249,018.08, plus interests and costs of the arbitration.
6 (Petition ¶ 11.) Respondents timely appealed that award to the
7 Trieste Court of Appeal, wherein they contended that the
8 arbitration award violated the Italian Civil Code, and was thus
9 null and void. (Bartlma Decl. Ex. B.) That appeal is currently
10 pending, and is scheduled for a hearing on June 15, 2007. (Ponti
11 Decl. ¶ 5.)

12 On June 8, 2004, petitioner sought to enforce the
13 arbitration award in the District Civil Court of Graz, Austria.
14 (Pressl Decl. ¶ 8.) On June 17, 2004, the Austrian District
15 Court ruled that the arbitration award was enforceable. (Id.)
16 Respondents, however, appealed that ruling to the Austrian
17 Appellate Court, arguing that the appeal pending in the Trieste
18 Court of Appeal rendered the arbitration award without the effect
19 of law. (Id.) On March 18, 2005, the Austrian Appellate Court
20 reversed the lower District Court's decision, and suspended
21 enforcement of the arbitration award pending the outcome of the
22 Italian appeal. (Id. ¶ 9.)

23 On January 21, 2005, petitioner filed with this court a
24 petition seeking to confirm the original enforcement award
25 pursuant to the Convention on the Recognition and Enforcement of
26 Foreign Arbitral Awards, 9 U.S.C. § 207. Petitioner predicates

27 _____
28 of the transactions contemplated in the agreement.

1 personal jurisdiction over respondents on the fact that a wholly-
2 owned subsidiary, Pewag Inc. ("Pewag America"), a New Jersey
3 corporation, maintains an office in
4 California. (Petition ¶ 7.)

5 Respondents now move to dismiss, arguing that this
6 court does not have personal jurisdiction over respondents and
7 based on the doctrine of forum non conveniens. In the
8 alternative, respondents request that this court stay the
9 proceedings until the Italian appeal is resolved. Petitioner
10 moves to strike portions of Mr. Ponti and Mr. Pengg's
11 declarations based on the assertion that the information stated
12 therein lacks proper foundation. Petitioner additionally moves
13 to strike a portion of the factual recitation in respondents'
14 motion to dismiss, arguing that it lacks relevancy and
15 foundation.

16 II. Discussion

17 A. Motion to Strike

18 _____ Upon a motion made by a party, the court may order
19 stricken from any pleading any insufficient defense or any
20 redundant, immaterial, impertinent, or scandalous matter. Fed.
21 R. Civ. P. 12(f). When ruling on a motion to strike, the court
22 views the challenged pleadings in the light most favorable to the
23 pleader. See Pillsbury, Madison & Sutro v. Lerner, 31 F.3d 924,
24 928 (9th Cir. 1994). Motions to strike are not favored and
25 "should not be granted unless it can be shown that no evidence in
26 support of the allegation would be admissible, or those issues
27 could have no possible bearing on the issues in the litigation."
28 Gay-Straight Alliance Network v. Visalia Unified School Dist.,

1 262 F. Supp. 2d 1088, 1099 (E.D. Cal. 2001).

2 _____Petitioner cites a case from the District Court of
3 Arizona for the proposition that a court considering a motion to
4 dismiss may only consider admissible evidence. Travelers Cas. &
5 Surety Co. v. Telstar Constr. Co., Inc., 252 F. Supp. 2d 917 (D.
6 Ariz 2003). There the court noted that, because the burden of
7 proving personal jurisdiction falls on the plaintiff, it is clear
8 "that Plaintiffs [sic] affidavits and exhibits submitted in
9 support of the Response to the [Motion to Dismiss] must comply
10 with the Rules of Evidence." Id. at 923 (emphasis added).
11 Assuming arguendo that respondent bears a similar burden,
12 petitioner's motion to strike must nonetheless be denied.

13 _____1. Ponti Declaration

14 Petitioner moves to strike paragraphs two, three, and
15 four of Luca Ponti's declaration, submitted in support of the
16 present motion to dismiss. These three paragraphs contain a
17 brief overview of the business transactions entered into between
18 petitioner and respondents, as well as the subsequent Settlement
19 between the parties and the ultimate dispute taken to
20 arbitration. Prior to these paragraphs, Mr. Ponti notes that the
21 facts contained therein "were reported to me by Mr. Pengg."
22 Petitioner therefore asserts that Mr. Ponti lacks personal
23 knowledge of the events described, and that these paragraphs are
24 inadmissible hearsay and lack adequate foundation.

25 Everything stated in these three paragraphs can be
26 verified by additional documents submitted with respondents'
27 motion. The three paragraphs give merely a brief overview of the
28 factual and procedural history of this case--which are described

1 in much greater detail in respondents' petition to the Italian
2 courts for review of the arbitration award. (Bartlmä Ex. B.)
3 Mr. Ponti undoubtedly had additional sources for the knowledge he
4 recounts, because, as he notes in the very next paragraph, he
5 filed the appeal of the arbitration award to the Italian court.
6 (Ponti Decl. ¶ 5.) Thus, as counsel for respondents in this
7 appeal, Mr. Ponti familiarized himself with the facts and history
8 of the original action by conducting a review of the record
9 below. Accordingly, these paragraphs will not be stricken.²

10 2. Pengg Declaration

11 Petitioner moves to strike paragraphs four, eight, and
12 twelve, as well as most of paragraphs five and eleven from Agyd
13 Pengg's declaration. All of these statements relate to how Pewag
14 America runs its own operations, separate from the international
15 Pewag entities. (Pengg Decl.) Pengg notes in his declaration
16 that, "although I am listed as the Secretary of the American
17 Subsidiary, I have no involvement in the operations of the
18 company" Petitioner therefore argues that because Pengg
19 doesn't play an active role in the operations of Pewag America,
20 he has no personal knowledge of how it operates its business.

21 _____ Mr. Pengg is the CEO of all three international Pewag
22 entities, and is thus intimately associated with the inner-
23 workings of these organizations, including the subsidiaries.

24 _____
25 ² The court notes, moreover, that these three brief
26 summary paragraphs in Ponti's declaration bear no direct
27 relevance to respondents' motion, which is founded on a claim of
28 lack of personal jurisdiction. Thus the court need not rely on
the declaration for these particular facts--even if the court
were to strike these portions of Mr. Ponti's declaration, it
would not impact its reasoning.

Neither party disputes that Pewag America is a subsidiary of Pewag International. Therefore, Mr. Pengg is in a very good position to speak to how Pewag America operates, particularly with regard to what tasks Pewag America performs on its own, without guidance or assistance from Pewag International. This is exactly the subject of the statements to which petitioner objects.

Merely because Mr. Pengg is not involved in making the day-to-day decisions for Pewag America does not mean he is not familiar with how they are made, or in the very least aware of the fact that they are made by Pewag America, and not Pewag International.³ There is ample foundation for Mr. Pengg's statements. Accordingly, these statements will not be stricken.

3. Factual Recitation in Motion to Dismiss

Petitioner objects to pages two through seven of the motion to dismiss, which constitutes the entire "Brief Statement of Facts" portion of respondents' motion. Specifically, petitioner argues that the facts cited lack relevancy and foundation, because 1) the background facts of the parties' original dispute is not relevant to the arbitral award, and 2) the factual recitation "relies heavily on the declarations of Ponti and Pengg." (Mot. to Strike 4-5.)

Pages two through seven merely provide an appropriate contextual background of the facts that led up to the ultimate

³ Petitioner argues inconsistently that Pewag International and Pewag America are one and the same entity, while arguing at the same time the CEO of Pewag International lacks foundation to speak regarding Pewag America's operations.

1 arbitration in issue. It is hard to reason that facts regarding
2 a business relationship, and an agreement to engage in business
3 transactions that contained an arbitration clause, are not
4 relevant to an ultimate action to enforce an arbitration award
5 under that exact clause. Moreover, because Mr. Ponti's and Mr.
6 Pengg's declarations are proper, a factual recitation relying on
7 these declarations is also proper. Accordingly, these pages will
8 not be stricken from the motion.

9 B. Motion to Dismiss

10 1. Legal Standard

11 Federal Rule of Civil Procedure 12(b)(2) governs the
12 dismissal of an action based on lack of personal jurisdiction.
13 On a motion to dismiss, the plaintiff bears the burden of
14 "demonstrat[ing] facts that if true would support jurisdiction
15 over the defendant." Ballard v. Savage, 65 F.3d 1495, 1498 (9th
16 Cir. 1995) (citation omitted). "Where not directly controverted,
17 plaintiff's version of the facts is taken as true for the
18 purposes of a 12(b)(2) motion to dismiss." Doe v. Unocal Corp.,
19 248 F.3d 915, 922 (9th Cir. 2001) (citing AT & T v. Compagnie
20 Bruxelles Lambert, 94 F.3d 586, 588 (9th Cir. 1996)).

21 A court's exercise of personal jurisdiction "must
22 comport with the state long-arm statute, and with the
23 constitutional requirements of due process." Omeluk v. Langsten
24 Slip & Batbygggeri A/S, 52 F.3d 267, 269 (9th Cir. 1995). Given
25 that California's long-arm statute extends jurisdiction to the
26 limits imposed by the Due Process Clause, the only question is
27 whether the exercise of jurisdiction is constitutionally
28 permissible. Cal. Code Civ. Proc. § 410.10; Ziegler v. Indian

1 River County, 64 F.3d 470, 473 (9th Cir. 1995).

2 The Ninth Circuit has made clear that, although Chapter
3 II of the Federal Arbitration Act, 9 U.S.C. §§ 201-208, provides
4 subject matter jurisdiction for District Courts, courts must
5 nonetheless have personal jurisdiction over a defendant--the
6 constitutional due process standards remain the same. Glencore
7 Grain Rotterdam B.V. v. Shivnath Rai Harnarian Co., 284 F.3d
8 1114, 1122 (9th Cir. 2002) ("[I]n suits to confirm a foreign
9 arbitral award under the Convention, due process requires that
10 the district court have jurisdiction over the defendant . . .
11 .").

12 Due process requires that a nonresident defendant have
13 certain "minimum contacts" with the forum state so that the
14 exercise of jurisdiction "does not offend traditional notions of
15 fair play and substantial justice." Int'l Shoe Co. v.
16 Washington, 326 U.S. 310, 316 (1945). Applying the minimum
17 contacts analysis, a court may obtain either specific or general
18 jurisdiction over a defendant. Unocal Corp., 248 F.3d at 923.

19 2. Specific Jurisdiction

20 _____To establish specific jurisdiction, the plaintiff must
21 show that: (1) defendant purposefully availed itself of the
22 privilege of conducting activities in California, thereby
23 invoking the benefits and protections of its laws; (2)
24 plaintiff's claims arise out of defendant's California-related
25 activities; and (3) the exercise of jurisdiction would be
26 reasonable. Ziegler, 64 F.3d at 473. In this case, the court
27 need look no further than the second prong. In assessing whether
28 a claim arises out of forum-related activities, "courts apply a

1 'but for' test." Unocal Corp., 248 F.3d at 924 (citing Ballard
2 v. Savage, 65 F.3d 1495, 1500 (9th Cir. 1995)). "[T]he Court
3 considers whether [petitioner's] claims would have arisen but for
4 [respondents'] contacts with California." Id.

5 Importantly, petitioner does not assert that the claims
6 against respondents for violation of the Agreement had anything
7 to do with respondent's California-related activities. Indeed,
8 the basic subject matter of the Agreement related to the
9 purchase, by Austrian entities, of three companies located in
10 Italy and owned by Italian citizens. Furthermore, both the
11 contract and the subsequent settlement agreement were negotiated
12 and signed in, and under the laws of, Italy. Because the claims
13 in this particular dispute have no relation to respondent's
14 asserted California contacts, the court does not have specific
15 jurisdiction over respondents, and it need not address
16 defendants' purposeful availment of California's laws or
17 reasonableness of asserting jurisdiction.⁴

18 ///

19 3. General Jurisdiction Based on California Contacts

20 General jurisdiction exists when a defendant is
21 domiciled in the forum state or has engaged in activities there
22 that are "substantial" or "continuous and systematic."
23 Panavision Int'l v. Toeppen, 141 F.3d 1316, 1320 (9th Cir. 1988)
24 (quoting Helicopteros Nacionales de Colombia, S.A. v. Hall, 466

25
26 ⁴ The court notes, however, that the reasonableness
27 inquiry for specific jurisdiction parallels the same inquiry into
28 reasonableness in assessing general jurisdiction. Thus, as
discussed in Section II(B)(3)(b) of this order, this factor in
evaluating specific jurisdiction would also likely counsel
against the existence jurisdiction.

1 U.S. 408, 414-16 (1984)). "The Supreme Court has bifurcated this
2 due process determination into two inquiries, requiring, first
3 that the [respondents] have the requisite contacts with the forum
4 state to render it subject to the forum's jurisdiction, and
5 second, that the assertion of jurisdiction be reasonable." Amoco
6 Egypt Oil Co. v. Leonis Navigation Co., Inc., 1 F.3d 848, 851
7 (9th Cir. 1993).

8 a. Minimum Contacts

9 It is undisputed in this case that respondents have no
10 direct contacts with California.⁵ (Petition ¶ 7; Mot. to Dismiss
11 7:20-24.) The only asserted connection to the forum state is
12 through respondents' wholly-owned subsidiary, Pewag America,
13 which has an office in California. (Petition ¶ 7.) In a case
14 such as this, where "the [respondents'] alleged contacts are
15 through its corporate subsidiaries, the Court must engage in a
16 preliminary inquiry to determine whether the subsidiaries
17 contacts are properly attributed to the [respondents]." Unocal
18 Corp., 248 F.3d at 925. The mere "existence of a relationship
19 between a parent company and its subsidiaries is not sufficient
20 to establish personal jurisdiction over the parent on the basis
21 of the subsidiaries' minimum contacts with the forum." Id.
22 (citing Transure, Inc. v. Marsh & McLennan, Inc., 766 F.2d 1297,
23

24 ⁵ Petitioner does additionally contend, upon information
25 and belief, that respondent Agyd Pengg travels to California to
26 participate in the business of Pewag. This assertion, however,
27 is directly contradicted by the Declaration of Agyd Pengg,
28 submitted in support of this motion, and petitioner offers no
evidence to support its contention. (Pengg Decl. ¶ 10) ("I have
not traveled to California on behalf of or in connection with the
business of the American Subsidiary. In fact, I have not
traveled to California in the past 10 years.")

1 1299 (9th Cir. 1985)). In addressing corporate separateness, the
2 Supreme Court has employed the principle that "a parent
3 corporation may be directly involved in the activities of its
4 subsidiaries without incurring liability so long as that
5 involvement is 'consistent with the parent's investor status.'" Id.
6 at 926 (citing United States v. Bestfoods, 524 U.S. 51, 72
7 (1998)).

8 However, "if the parent and subsidiary are not really
9 separate entities, or one acts as an agent of the other, the
10 local subsidiary's contacts with the forum maybe be imputed to
11 the foreign parent corporation." Id. (citing El-Fadl v. Cent.
12 Bank of Jordan, 75 F.3d 668, 676 (D.C. Cir. 1996)). In
13 particular, the Ninth Circuit has noted two typical instances
14 where a subsidiary's contacts will be imputed to the parent: 1)
15 when the subsidiary is an "alter ego" of the parent, and 2) when
16 the subsidiary is acting as an "agent" of the parent. Id.; see
17 also Kramer Motors, Inc. v. British Leyland, Ltd., 628 F.2d 1175
18 (9th Cir. 1980).

19 i. Alter Ego

20 To demonstrate that a subsidiary is an "alter ego" such
21 that its contacts with a forum should be imputed to a parent
22 (also known as "merger"), the plaintiff must show "(1) that there
23 is such unity of interest and ownership that the separate
24 personalities [of the two corporations] no longer exist and (2)
25 that failure to disregard [their separate identities] would
26 result in fraud or injustice." AT & T, 94 F.3d at 591.
27 "Underlying both of these factors is a general presumption in
28 favor of respecting the corporate entity." Calvert v. Huckins,

1 875 F. Supp. 674, 678 (E.D. Cal. 1995). Courts have interpreted
2 this first prong as an inquiry into whether or not the parent
3 controls the internal affairs and day-to-day operations of the
4 subsidiary so as to "render the latter the mere instrumentality
5 of the former." Unocal Corp., 248 F.3d at 926.

6 In this case, petitioner has failed to demonstrate that
7 respondents exercise sufficient control over Pewag America so as
8 to create a prima facie case of alter ego jurisdiction. The only
9 contentions petitioner offers in support of this proposition are:
10 1) that "Pewag International uses Pewag [America] to conduct
11 business on its behalf in this district and elsewhere" and that
12 their interests are thus "closely aligned;" 2) respondent Agyd
13 Pengg is the Corporate Secretary of Pewag America; and 3) Pewag
14 American and Pewag International's web-sites demonstrate
15 sufficient interconnectivity. (Petition ¶¶ 7-8, 10; Opp'n to
16 Mot. to Dismiss 5-6.)

17 However, it is undisputed that Pewag America an
18 independently operated manufacturing and distribution center.
19 (Pengg Decl. ¶ 3.) It maintains its own payroll, marketing,
20 distribution and manufacturing facilities. (Id. ¶ 4.) Moreover,
21 it hires its own managers and employees, and makes all of its day-
22 to-day financial decisions based on its own needs and business
23 strategies. (Id. ¶ 5.) Indeed, while Pewag America does receive
24 some of its merchandise, specifications, and branding information
25 from Pewag International, it also conducts business with a
26 completely unrelated Chinese manufacturer. (Id.)

27 Although petitioner is correct in pointing out that
28 respondent Pengg is a Corporate Secretary for the American

1 subsidiary, he has no involvement with the running of the
2 company, and has never even traveled to California on business.
3 (Id. ¶ 10.) It is well established that mere presence on the
4 board of a subsidiary by a director of the parent is insufficient
5 to make the subsidiary an "alter ego." Kramer, 628 F.2d at 1177.
6 Plaintiffs have submitted no evidence to show that respondents
7 ever controlled the Board or the internal day-to-day affairs of
8 Pewag America, and thus Pewag America is not an alter ego of
9 respondent companies, for the purposes of establishing personal
10 jurisdiction.

11 With regard to the web-sites of Pewag International and
12 its American subsidiary, petitioner observes that Pewag America's
13 website boasts of "a company with 275 years of experience," when
14 in fact it is Pewag International that has been in existence that
15 long. Petitioner also notes that many of the product information
16 pages on the American subsidiary's website contain a German
17 language description. Finally, petitioner notes that Pewag
18 International's website lists Pewag America's contact
19 information, and contains many similar pictures and product
20 information pages as its American counterpart.

21 However, all of these superficial indications of the
22 interrelated nature of the companies are precisely what would be
23 expected given that Pewag America is a subsidiary of Pewag
24 International. Respondents do not deny that they own the
25 American subsidiary and that Pewag America sells some of its
26 products. Therefore, some overlap is inevitable with regard
27 images, product descriptions, and general information.
28 Significantly, none of the information on the web-sites cited by

petitioner indicates that Pewag International exercises any control over the operations or decision making of its American subsidiary. All that the web-sites reveal is that the two companies are related, a fact which respondents do not dispute.⁶

ii. Agency

Alternatively, a subsidiary's contacts can be attributed to the parent when it performs services that are sufficiently important to the foreign corporation that if it did not have a representative to perform them, the corporation's own officials would undertake to perform substantially similar services." Chan v. Society Expeditions, Inc., 39 F.3d 1398, 1405 (9th Cir. 1994) (quoting Wells Fargo & Co. v. Wells Fargo Express Co., 556 F.2d 406, 423 (9th Cir. 1977)). Courts have permitted such imputation of contacts when the subsidiary is engaged in activities that, "but for the existence of the subsidiary, the parent would have to undertake itself." Id. at 1405 n.9. The fundamental question is whether the subsidiary's presence "substitutes for the presence of the parent." Unocal Corp., 248 F.3d at 929 (quoting Gallagher v. Mazda Motor of Am., Inc., 781 F. Supp. 1079, 1084 (E.D. Pa. 1992)).

⁶ Petitioner cites Anderson v. Dassault Aviation, 361 F.3d 449, 453-55 (9th Cir. 2004), for the proposition that web-site content can establish a prima facie case of alter ego. In Anderson, however, the court noted that the parent had "sufficient contacts with Arkansas to support an Arkansas court's assertion of personal jurisdiction over it whether or not [the subsidiary] is its alter ego." Id. at 453. This was because the website created by the parent corporation (a jet manufacturing company) revealed that the subsidiary was "the main completion center for all Falcon jets worldwide." Thus, the subsidiary played an integral and necessary part in the parent's operations. No such relationship is even hinted at in this case, as Pewag America and Pewag International operate independently.

1 Notably, some courts have additionally held that in
2 order for the agency test to be satisfied, the parent must
3 exercise sufficient internal or day-to-day control over the
4 subsidiary as in the alter ego test. Kramer, 628 F.2d at 1177-
5 78; Unocal, 248 F.3d at 926 ("An alter ego or agency relationship
6 is typified by parental control of the subsidiary's internal
7 affairs or daily operations."); but see Modesto City Schools v.
8 Riso Kagaku Corp., 157 F. Supp. 2d 1128, 1132-34 (E.D. Cal. 2001)
9 (arguing that the correct contextual reading of the agency test
10 in Unocal reveals that a parent's day-to-day control over the
11 subsidiary "is not the sine qua non of the general agency test").

12 The court need not opine as to the significance of
13 parental control over a subsidiary for the agency test, however,
14 for in this instance it is clear that petitioner has failed to
15 carry the burden. There are no facts alleged to indicate that,
16 but for the existence of Pewag America, the respondent companies
17 would have to undertake the activities in which the subsidiary
18 engages--Pewag International is completely self-sufficient and
19 performs on its own every task needed to do business. Other than
20 the assertion of a parent-subsidiary relationship, petitioner has
21 submitted no evidence regarding the interrelation of the
22 respondents' and Pewag America's businesses. Because there is a
23 presumption in favor of respecting the separateness of the
24 corporate entities, petitioner's failure to evince an agency
25 relationship means that personal jurisdiction over respondents
26 can not be predicated on these grounds.

27 B. Reasonableness

28 Even assuming that sufficient minimum contacts existed,

1 this court must still inquire into the reasonableness of
2 asserting jurisdiction over respondents. Glencore, 284 F.3d at
3 1125 (citing Asahi Metal Indus. Co. v. Superior Court, 480 U.S.
4 102, 113 (1987)). In assessing the reasonableness of exercising
5 jurisdiction, the court must consider seven factors in its
6 analysis: "1) the extent of a defendant's purposeful interjection
7 into the forum state's affairs; 2) the burden on the defendant of
8 defending in the forum; 3) the extent of conflict with the
9 sovereignty of the defendant's home state; 4) the forum state's
10 interest in adjudicating the dispute; 5) the most efficient
11 judicial resolution of the controversy; 6) the importance of the
12 forum to the plaintiff's interests in convenient and effective
13 relief; and 7) the existence of an alternative forum." Myers v.
14 Bennett Law Offices, 238 F.3d 1068, 1075 (9th Cir. 2001) (citing
15 Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985)).

16 1) With regard to respondents' purposeful interjection
17 into the forum state's affairs, petitioner does not dispute that
18 respondents do not direct sales to the forum state, nor do they
19 advertise or market, hire or manufacture in California. (Peng
20 Decl. ¶ 6.) Nor is there any evidence that respondent Peng has
21 ever traveled to California on business. (Id. ¶ 10.)
22 Respondents' singular connection with California is their wholly
23 owned subsidiary. Indeed, "[t]his factor parallels the question
24 of minimum contacts" and thus, for the reasons discussed above,
25 the contacts of Pewag America can not be imputed to its parent.
26 Amoco Egypt, 1 F.3d 852, which counsels against a finding of
27 personal jurisdiction over respondents.

28 2) The burden on respondents, and indeed on petitioner

1 as well, would be great were they forced to litigate this issue
2 in California. Respondents are all located in Austria, and all
3 potential witnesses and relevant evidence is similarly located in
4 Austria and Italy. Moreover, respondents own no property in
5 California, and have no employees or persons in California who
6 are authorized to act on its behalf.⁷ Petitioner contends that
7 this case will not involve many witnesses or substantial
8 evidence. (Opp'n to Mot. to Dismiss 12.) Nonetheless, all
9 evidence and witnesses which are required are all located a
10 significant distance from the forum, which further argues against
11 asserting jurisdiction. See Asahi Metal Indus. Co., Ltd. v.
12 Superior Court of CA, Solano County. 480 U.S. 102, 114 (1987)
13 ("The unique burdens placed upon one who must defend oneself in a
14 foreign legal system should have significant weight in assessing
15 the reasonableness of stretching the long arm of personal
16 jurisdiction over national borders."); see also Glencore, 284
17 F.3d at 1114 (noting a substantial burden because "its potential
18 witnesses and evidence are likely half a world away").

19 3) As to the potential conflict with Austrian
20 sovereignty, as a general rule this factor tends to counsel
21 against the reasonableness of personal jurisdiction over a party
22 from a foreign country. Glencore, 284 F.3d at 1126 (citing Amoco
23 Egypt, 1 F.3d at 852) ("Where, as here, the defendant is from a
24 foreign nation rather than another state, the sovereignty barrier
25

26 ⁷ It is undisputed that Pewag America was not a party to
27 the arbitration or underlying agreements in this case. Thus,
28 regardless of the interconnectedness of the parent-subsidiary
relationship, Pewag America is not authorized to act on behalf of
respondents nor is it liable for any arbitration award.

1 is high and undermines the reasonableness of personal
2 jurisdiction.").

3 4) California appears to have no cognizable interest in
4 adjudicating the matter. The dispute at hand involves Austrian
5 and Italian parties, executing in Italy a contract governed by
6 Italian law, which provided for arbitration in Italy in the event
7 of a dispute. Neither party has a direct presence in California,
8 nor any property in the forum state which might be relevant to
9 issuance of an award. See e.g. Asahi, 480 U.S. at 114 (1987)
10 ("Because the plaintiff is not a California resident,
11 California's legitimate interests in the dispute have
12 considerably diminished.").

13 5) Determining the most efficient resolution "involves
14 a comparison of alternative forums." Amoco Egypt, 1 F.3d at 852.
15 "The site where the injury occurred and where evidence is located
16 usually will be the most efficient forum." Pac. Atl. Trading Co.
17 v. M/V Main Express, 758 F.2d 1325, 1331 (9th Cir. 1985). In
18 this case, as mentioned above, the injury occurred between
19 parties in Austria and Italy, under the province of Italian law,
20 and as such all witness and evidence are already located in that
21 forum. Moreover, because petitioner's request would require this
22 court to inquire into the validity under Italian Civil Code of an
23 arbitration award issued by the Italian courts, the application
24 of unfamiliar Italian law by this court would further undermine
25 the efficiency of the proceeding.

26 6) The sixth factor evaluates petitioner's interest in
27 the litigation being brought before this particular court. Even
28 this factor seems to only weigh against the reasonableness of

1 petitioner's assertion of jurisdiction over respondents. As
2 noted, petitioner is a resident of Italy, the harm occurred in
3 Italy, and all relevant witnesses and evidence are similarly in
4 Italy or Austria. Petitioner has not asserted any connection to
5 California and has given no indication of its interest in
6 litigating the matter here. Indeed, the only motive of which
7 this court can conceive for bringing the suit in California (or
8 any United States court of federal jurisdiction) is to avoid the
9 impact of the proceeding already underway in Italy, which is
10 insufficient to tilt the balance in petitioner's favor.

11 7) The final factor requires petitioner to demonstrate
12 the "unavailability of an alternative forum." Amoco Egypt, 1
13 F.3d at 853. Undoubtedly, petitioner cannot meet this burden.
14 First, the original arbitration, provided for by the agreement
15 between the parties, occurred in Italian courts, applying Italian
16 law. An appeal of this action is still pending, and petitioner
17 has shown no reason why that forum, agreed to by the parties as
18 the appropriate forum for resolving disputes, is no longer a
19 viable option. Moreover, the enforcement action in Austrian
20 court (presently stayed awaiting the outcome of the Italian
21 appeal) also provides a convenient alternative forum, as
22 respondents are all located within that forum. Overall, each of
23 the seven Burger King factors counsel that this courts assertion
24 of personal jurisdiction over respondents in this case would not
25 be reasonable.

26 4. General Jurisdiction Based on National Contacts

27 Petitioner argues that, even if general jurisdiction is
28 not found based on respondents' California contacts, Rule 4(k)(2)

1 provides for personal jurisdiction based on respondents' national
2 contacts.⁸ General jurisdiction based on national contacts
3 requires that: 1) the cause of action arise under federal law; 2)
4 the defendant not be subject to the personal jurisdiction of any
5 state court of general jurisdiction; and 3) exercising
6 jurisdiction comports with due process. Glencore, 284 F.3d at
7 1126. Thus, just like analyzing respondents' California
8 contacts, the court must consider the minimum national contacts
9 and reasonableness of asserting jurisdiction.

10 Petitioner does not cite a single specific fact
11 regarding the nature or scope of respondents' national contacts.
12 Instead, petitioner merely states that "an arbitral enforcement
13 action in this forum would [not] be so unfair or inconvenient as
14 to infringe [respondents'] liberty interests." This is
15 insufficient to satisfy petitioner's burden of demonstrating
16 personal jurisdiction--petitioner must demonstrate a prima facie
17 case based on some purported national contacts. See Ballard, 65
18 F.3d at 1498.

19 As discussed above, and conceded by petitioner,
20 respondents have no direct contacts with the United States--their
21 only purported contact is through their wholly-owned subsidiary.
22 However, for all of the reasons noted in the minimum contacts
23 discussion above, the American subsidiary's contacts are not

24
25 ⁸ Federal Rule of Civil Procedure 4(k)(2) provides that,
26 "If the exercise of jurisdiction is consistent with the
27 Constitution and laws of the United States, serving a summons or
28 filing a waiver of service is also effective, with respect to
claims arising under federal law, to establish personal
jurisdiction over the person of any defendant who is not subject
to the jurisdiction of the courts of general jurisdiction of any
state."

1 imputed to respondents. Even if they were, Rule 4(k)(2) would be
2 inappropriate, because jurisdiction founded on national contacts
3 requires that defendant not be subject to jurisdiction in any
4 state court of general jurisdiction. Unocal, 248 F.3d at 922-23
5 ("If [the] subsidiaries' contacts were imputed to [the parent],
6 however, several states would have jurisdiction over [the
7 parent], and Rule 4(k)(2) would not apply."). If the
8 subsidiaries contacts were to be attributed to the parent, then
9 general jurisdiction would exist in California, not nationally,
10 based on contacts with the state. As the discussion above
11 illustrates, however, Pewag America's contacts are not attributed
12 to Pewag International--thus Pewag International has no national
13 contacts. Therefore, personal jurisdiction over respondents
14 cannot be based on national contacts.⁹

15 5. Quasi-in-rem Jurisdiction

16 Petitioner finally asserts that respondents are subject
17 to quasi in rem jurisdiction based on their ownership of property
18 and/or assets in California. In some cases the Supreme Court has
19 implied that, even without personal jurisdiction, a court may
20 nonetheless attach a party's in-state property to enforce a
21 previous judgment. See Shaffer v. Heitner, 433 U.S. 186, 210
22 n.36 (1977) ("Once it has been determined by a court of competent
23 jurisdiction that the defendant is a debtor of the plaintiff,
24 there would seem to be no unfairness in allowing an action to
25 realize on that debt in a State where the defendant has property,

26
27 ⁹ Even if the court found sufficient national contacts to
28 support the assertion of personal jurisdiction, a reasonableness
inquiry would, for the same reasons discussed in Section
II(B) (3) (b), mandate a finding of no personal jurisdiction.

1 whether or not that State would have jurisdiction to determine
2 the existence of the debt as an original matter."); see also
3 Carolina Power & Light Co. v. Uranex, 451 F. Supp. 1044, 1049
4 (N.D. Cal. 1977) (finding no personal jurisdiction, but allowing
5 plaintiff to attach defendant's California property as security
6 pending arbitration between parties in New York).¹⁰

7 Regardless of the breadth of quasi in rem jurisdiction,
8 as explained by the court in Glencore, the "sine qua non of
9 basing jurisdiction on a defendant's assets in the forum is the
10 identification of some asset." 284 F.3d at 1127. As in
11 Glencore, petitioner here has failed to identify any property
12 owned by respondents in California. The complaint contains no
13 allegations of any property owned by respondents and located in
14 California. The Newcastle, California, office belongs to the
15 American subsidiary, not to respondents, and petitioner does not
16 cite any other specific asset which could be attached.

17 The only evidence petitioner offers regarding possible
18 California assets is a singular unsubstantiated assertion that
19 respondents "have property and assets in California based upon
20 money owing from the American subsidiary with a primary location
21 in Newcastle, California." (Opp'n to Mot. to Dismiss 9.) This
22 is insufficient to satisfy petitioner's burden. See Glencore,

23
24 ¹⁰ Notably, the only authority cited by petitioner where a
25 court predicated jurisdiction based on quasi in rem jurisdiction
26 was an unpublished case from the Southern District of New York.
27 CME Media Enters. B.V. v. Zelezny, 2001 WL 1035138, *5 (S.D.N.Y.
28 September 10, 2001). In that case, however, the court did not in
fact determine that it had personal jurisdiction over defendant,
but merely that it had the power to attach defendant's property
present in the state. Id. (confirming an arbitration award and
allowing attachment "to the extent of \$0.05.")

1 284 F.3d at 1128 ("Indeed, the best [plaintiff] can say is that
2 it believes in good faith that [defendant] has or will have
3 assets located in the forum. This is simply not enough."); H.
4 Ray Baker, Inc. v. Assoc. Banking Corp., 592 F.2d 550, 552 (9th
5 Cir. 1979) (citing Shaffer, 433 U.S. 185) ("The presence of
6 assets in California is a relevant contact, though not one that
7 is sufficient by itself to confer jurisdiction."). Accordingly,
8 petitioner has failed to make out a prima facie case of quasi in
9 rem jurisdiction.

10 6. Request for Jurisdictional Discovery

11 Petitioner requests that, if this court finds she has
12 not satisfied her burden of demonstrating facts sufficient to
13 establish jurisdiction over defendant, she be entitled to
14 jurisdictional discovery to gather further evidence. Discovery
15 "should be granted where pertinent facts bearing on the question
16 of jurisdiction are controverted . . . or where a more
17 satisfactory showing of the facts is necessary." Wells Fargo &
18 Co. v. Wells Fargo Exp. Co., 556 F.2d 406, 430 n.24 (9th Cir.
19 1977). However, a refusal to grant such discovery "is not an
20 abuse of discretion when it is clear that further discovery would
21 not demonstrate facts sufficient to constitute a basis for
22 jurisdiction. Id. (citing Budde v. Ling-Temco-Vought, Inc., 511
23 F.2d 1033, 1035 (10th Cir. 1975).

24 In this case, petitioner's attempt to establish
25 personal jurisdiction over respondents is not merely lacking in
26 evidence--petitioner does not even have any idea of what sort of
27 evidence jurisdictional discovery might uncover. It is
28 undisputed that the solitary contact with California is an office

1 owned and run by the American subsidiary, and at oral argument
2 petitioner was unable to indicate what, if any, evidence might be
3 discovered to connect the actions of that office to Pewag
4 International. The only evidence petitioner suggests might be
5 found are records of accounts receivable, for chains purchased by
6 Pewag America from Pewag International. This, petitioner
7 contends, might be sufficient for quasi-in-rem jurisdiction.

8 First, as the court has already explained, quasi in rem
9 jurisdiction is not a means of acquiring jurisdiction over a
10 party, but merely a means of attaching property. Second, it is
11 not even clear that such a tenuous financial connection is
12 sufficient to establish quasi in rem jurisdiction. The only case
13 petitioner cites for this proposition is Carolina Power & Light
14 Co. v. Uranex, 451 F.Supp. 1044 (C.D. Cal. 1977). However, while
15 the court in that case did postpone vacating an attachment of an
16 \$85 million debt, owed by an instate debtor corporation to a
17 corporation out-of-state, the court also made clear that in order
18 to be "constitutionally permissible," the facts must "show that .
19 . . the attaching jurisdiction is not an inconvenient arena for
20 defendant to litigate the limited issues arising from the
21 attachment." Id. at 1050. In that case, the "[the out-of-state
22 corporation] had agreed to litigate in California any disputes
23 that might arise in its dealings with [the instate debtor]."

24 By contrast, as already explained in detail in this
25 order's consideration of the reasonableness of asserting personal
26 jurisdiction over respondents, the inconvenience to respondents
27 is great. Overall, petitioner's assertion of personal
28 jurisdiction over respondents seems based on mere assertion, and

1 neither this court, nor petitioner for that matter, can foresee
2 any what substantial evidence might be uncovered by granting
3 jurisdictional discovery. Terracom v. Valley Nat. Bank, 49 F.3d
4 555, 562 (9th Cir. 1995) (citing Rich v. KIS Cal., Inc., 121
5 F.R.D. 254, 259 (M.D.N.C. 1988)) ("[W]here a plaintiff's claim of
6 personal jurisdiction appears to be both attenuated and based on
7 bare allegations in the face of specific denials made by
8 defendants, the court need not permit even limited discovery . .
9 . ."). Discovery will not cure this constitutional deficit.
10 Accordingly, the court will deny petitioner's request for
11 jurisdictional discovery.

12 IT IS THEREFORE ORDERED that petitioner's motion to
13 strike be, and the same hereby is, DENIED.

14 IT IS FURTHER ORDERED that respondents' motion to
15 dismiss be, and the same hereby is, GRANTED.

16 DATED: February 2, 2007

17 

18 WILLIAM B. SHUBB
19 UNITED STATES DISTRICT JUDGE
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